UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO, CALIFORNIA

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 7,

Respondent

and

Case No. 27-CB-4610

ALBERTSON'S, INC.,

Charging Party

Barbara D. Josserand, Esq., for the General Counsel John Bowen, Esq., for the Respondent John L. Zenor, Esq., for the Charging Party

DECISION¹

Albert A. Metz, Administrative Law Judge. The issue presented is in violation of Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (Act).² On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the Respondent Union's oral argument and the briefs filed by the Government and the Charging Party, I make the following findings of fact.

This case was heard at Denver, Colorado on November 23, 2004.

² 29 U.S.C. § 158 (b)(1)(A) and 8(b)(2).

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits, and I find, that Albertson's, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Employer operates retail grocery stores in the State of Colorado. The Respondent
Union represents certain units of retail clerks or meat employees at some of these stores, including in Colorado Springs, Colorado. The Employer and Respondent have been signatory to a series of collective bargaining agreements covering separate units of retail clerk employees and meat employees working in the Employer's Colorado Springs stores since mid-1980 and these collective bargaining agreements have contained recognition clauses. The exact recognition language in the contracts varies slightly, but the Parties all agree that they essentially state that the Employer will recognize the Union as the representative of the various unit employees at all Colorado Springs stores.

The Parties have been negotiating for new agreements covering units of clerks and meat department employees in Colorado Springs but no new agreements have been concluded as of the date of the hearing. The last Colorado Springs Clerk Agreement had a term of September 1, 1999 to September 11, 2004. The recognition language in the Clerk Agreement is set out in Article 1, Section 1. The latest Meat Agreement had a term of November 1, 1999, to November 6, 2004. The recognition language in the Meat Agreement is found in Article 1, Section 1.

25

30

35

20

5

A. Store 840

In February 2003 the Employer was operating four grocery stores (stores 828, 858, 873, and 879) and two warehouses in the Colorado Springs area. One of the stores, 879, and the two warehouses, were nonunion. In February the Employer opened an additional Colorado Springs store, number 840.

Prior to opening store 840, the Employer posted notices for job openings at this new location at its other Colorado Springs stores. The Respondent was aware of these postings and on February 4, 2003, John Mathewson, Director of Respondent, sent a letter to the Company's Manager of Labor and Employee Relations, Amanda Paquet, stating that not many employees were applying to transfer to store 840 because they believed the store would be operated on a nonunion basis. Mathewson noted that the new store was scheduled to open within the month and he stated:

The recognition language contained in the Colorado Springs Collective Bargaining Agreement clearly states that the Employer recognizes the Union for all stores in the metropolitan area of Colorado Springs. The Union is requesting that the Company repost the stores in Colorado Springs and refrain from discouraging employees from transferring to the new store by telling them it will be non-union. (G. C. Exh. 5)

On February 18, 2003, Paquet replied to Mathewson and denied that the Employer was discouraging employees from applying to transfer to the new store by telling them it would be nonunion. She noted that there was no evidence to support the Union's claim and that both union and nonunion employees had applied and been hired at the new store. The same day Mathewson responded to Paquet that the Respondent was "disappointed that the Company is blatantly refusing to honor the terms of the collective bargaining agreement." The Respondent's President, Ernest L. Duran, Jr., also sent a letter to the Employer on February 18 which was directed to Judy Spires, President of the Rocky Mountain Division. Duran asked Spires to correct Paquet's position regarding the Employer's recognition obligation with respect to store 840.

5

10

15

20

25

40

On February 26, 2003, the Respondent filed a grievance in both the meat and clerk units alleging that the Employer "would not honor the recognition clause" contained in the parties' Agreement. The parties treated these grievances as referring specifically to the Store 840 situation. The Employer contested the grievances by arguing that the Respondent had never shown that it represented a majority of the meat or clerk unit employees at Store 840. The Employer, therefore, refused to process the grievance beyond the first step in the grievance procedure. The Respondent sought to continue processing the grievances by requesting the Employer participate in selecting a panel of arbitrators to hear the grievance. Additionally, the Union sought information from the Employer as to matters involved in the grievances. The Employer rebuffed both of these efforts based on its belief it had no bargaining obligation with regard to store 840.

Paquet and Mathewson had several telephone conversations in which they discussed store 840 and the fact that the Employer would not process the grievances with respect to non-represented employees. Paquet consistently told Mathewson that the Employer would not recognize the Union as the representative of the store 840 employees absent a demonstration from the Union that it represented a majority of the unit employees. The Respondent has never offered such evidence to the Employer.

In May 2003 the Employer presented the Respondent with a draft letter stating that it was filing an unfair labor practice charge against the Respondent because of its repeated attempts to force the Employer to recognize the Respondent as the employees' representative without any showing of majority status. The Respondent thereafter took no further steps to process the grievances in Store 840.

B. Store 803

On March 12, 2004, Mathewson sent Paquet a letter regarding the proposed opening of new Colorado Springs store 803. In the letter, Mathewson again referred to the recognition clause in the Parties' collective bargaining agreement for Colorado Springs stores, and asked, "whether or not Albertson's intends to honor the recognition clause agreed to by both parties." Paquet did not respond to this letter. The Respondent then filed grievances for both the retail clerk and the meat department employee units at store 803 alleging that the Employer was not honoring the recognition clause in the Colorado Springs collective bargaining agreement. The Employer refused to process the store 803 grievances and the Respondent argued that there had been forfeiture under the Agreements. The Respondent then again sought to move the grievances to arbitration and asked the Employer to agree to select an arbitrator.

On June 3, 2004, Paquet sent a letter to the Respondent noting the Company's position that there was not going to be an "automatic recognition" of the Union at stores 803 and 840 absent a showing from the Respondent that it had majority status in the appropriate unit. The Respondent did not respond to this letter. The following day the Respondent filed a Complaint in the United States District Court for the District of Colorado seeking to compel arbitration of the filed grievances regarding store 803.

20

25

30

40

5

10

15

III. ANALYSIS

It is well established that it is an unfair labor practice for an employer to recognize a union as the representative of its employees when only a minority of employees had authorized the union as its representative at the time of recognition. *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961). This axiom was reiterated in *Kroger Co.*, 219 NLRB 388 (1975), where the Board interpreted a contractual recognition provision to be an agreement under which the employer had waived its right to demand a Board-conducted election at the disputed stores. Although the clause contained no specific declaration that the employer had consented to such a waiver, the Board found that:

There is no need to hold these clauses totally invalid because they do not contain an explicit condition that the unions must represent a majority of employees in the new store, inasmuch as the Board will impose such a condition as a matter of law.

35 Id. 388.

Interpreting these clauses to mean that an employer can voluntarily recognize a union or demand an election renders them totally meaningless and without effect, for unions need no contract authorization to establish their representation status in a Board-conducted election. However, these clauses can be read to require recognition upon proof of majority status by a union.

Id. at 389.

The Board is the sole statutory authority to determine representational issues. In contrast to a defense imposed by the Union, the Board has long held that it "will not defer the questions of representation, accretion, or unit appropriateness to arbitrators as they involve application of statutory policy and are singularly within the Board's province." Carr-Gottstein Foods Co., 307 NLRB 1318, 1319 (1992). I find that in the instant case the matter must be resolved, not merely by an interpretation of the recognition clause, but rather by the established Board authority of what is required before recognition can lawfully be extended to a Union. I find that although the recognition clauses do not state a requirement of proof of majority status, the Board authority makes it clear that some form of proof of majority support is necessary in order for the recognition of the Union to be lawful under the Act. Pall Biomedical Products Corporation, 331 NLRB 1674, 1675-7 (1992) ("The fact that the clause itself did not contain an explicit condition that the union obtain the support of a majority of the employees in a new store was immaterial because the Board would impose such a condition as a matter of law.") I conclude, therefore, that the Respondent's efforts to enforce the recognition clauses in this case and require the Employer to recognize it as the collective bargaining agent for the employees at stores 803 and 840 without a proof of its majority representational status is a violation of the Sections 8(b)(1)(A) and 8(b)(2) of the Act. Further, the Respondent's efforts to enforce these unlawful demands by filing grievances, demanding that the Employer arbitrate the grievances, and by filing a District Court action to compel the Employer to arbitrate the grievances likewise violate the same sections of the Act. ³

CONCLUSIONS OF LAW

- 1. Albertsons, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
 - 2. The Respondent, United Food and Commercial Workers, Local 7, is a labor organization within the meaning of Section 2(5) of the Act.
 - 3. The Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act.
 - 4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:⁴

The Respondent has argued that the complaint allegations concerning store 840 are without merit because the Union has done nothing within the six months prior to the charge being filed in this case to pursue its claim regarding that store. The record evidence indicates that the Union has never withdrawn the grievances concerning store 840 nor disavowed its intent to seek representation without a showing

section 10(b) defense is without merit.

5

10

15

20

30

of majority support from the unit employees of that store. I find, therefore, that the Respondent's

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, United Food and Commercial Workers, Local 7, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from:
- (a) Pursuing or processing the grievances it filed with respect to stores 840 and 803.

10

- (b) Withdraw the grievances it filed with respect to stores 840 and 803 and any actions initiated in pursuit of them, including the Motion to Compel Arbitration filed in the District Court for the District of Colorado on or about June 4, 2004.
- (c) Any like and related manner from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act:
- (a) Within 14 days after service by the Region, post at its offices in Wheat Ridge, Colorado, copies of the attached notice marked "Appendix." ⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that
 30 the Respondent has taken to comply.

Dated: March 30, 2005

Albert A. Metz
Administrative Law Judge

If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

5

Posted by Order of the National Labor Relations Board An Agency of the United States Government

10 The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

15

Form, join, or assist a union Choose representatives to bargain on your behalf with your employer Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT pursue or process the grievances we have filed with respect to Albertson's Colorado Springs, Colorado, stores 840 and 803.

WE WILL NOT in any like and related manner from interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

25

WE WILL withdraw the grievances we filed with respect to stores 840 and 803 and any actions initiated in pursuit of them, including the Motion to Compel Arbitration filed in the District Court for the District of Colorado on or about June 4, 2004.

30

		United Food and Commercial Workers, Local 7		
		(Labor Organization)		
Dated	$\mathbf{B}\mathbf{y}$			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433 (303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-3554.